(2014) 09 DEL CK 0144

Delhi High Court

Case No: Crl. A. 442/2014 & Crl. M.A.11280/2014

Sanjay Kumar		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: Sept. 18, 2014

Acts Referred:

- Penal Code, 1860 (IPC) - Section 392, 397, 398

Hon'ble Judges: Sunita Gupta, J

Bench: Single Bench

Advocate: Sumeet Verma and Amit Kala, Advocate for the Appellant; Jasbir Kaur, Additional Public Prosecutor, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Sunita Gupta, J.

Challenge in this appeal is to the judgment dated 18.05.2011 and order on sentence dated 24.05.2011 arising out of Sessions Case No. 1202/10 whereby the appellant was convicted for offence u/s. 392/397 IPC and was sentenced to undergo rigorous imprisonment for 7 years and to pay fine of Rs.2000/-, in default to undergo simple imprisonment for a period of 15 days.

2. Sum and substance of the prosecution case is that on 18.11.2009, Saurabh Aggarwal (PW3) was travelling in bus route No. 182 which he boarded from Keshavpuram metro station and was going towards Pitampura. When the bus reached Subhash Nagar, he noticed that his blackberry mobile phone which he had purchased on 16.11.2009 i.e. just two days before the incident was missing. He noticed that 2-3 boys were standing very near to him and he got suspicious and raised alarm and tried to search the boy who was standing near him. Three other boys were standing next to him and when he raised alarm, two of them took out knives. One of them put the knife on his neck while the other at his back and then they removed his spectacles and purse containing Rs.2,000 and I- card. They also

declared that his mobile phone is with them and it is their regular business. When the bus stopped at SD Block bus stand, the boys got down and went away. He also got down at Kohat Enclave Metro station bus stand and after requesting a passerby to lend his mobile phone, made a call to his father, who reached Kohat Enclave metro station bus stand. Thereafter, he along with his father went to the police station and lodged his complaint Ex. PW 3/A which became bed rock of investigation.

3. It is further the case of prosecution that Saurabh was standing at Subhash Place bus stand on 02.12.2009 at about 6.30 p.m and was waiting for a public transport to travel towards Rohini. He noticed that the three boys who had committed the robbery were standing at Subhash Place bus stand. He also found three police officials standing in the same bus stand and on recognising those boys, he went to the police officials and informed them that all the three boys were the ones who had committed the incident of robbery with him on 18.11.2009. On his pointing out, the police officials apprehended the boys and his blackberry mobile phone was recovered from accused Tarun. The witness also identified accused Sanjay and Deshraj as those who had taken out their knives and shown the same to him. Deshraj had removed his spectacles after showing the knife to him while Sanjay removed his purse after showing the knife.

4. In order to bring home the guilt of the accused persons, prosecution, in all examined nine witnesses. The case of accused was one of denial simpliciter. According to him, he was lifted from his house and falsely implicated in this case. After meticulously examining the evidence led by the prosecution, vide impugned judgment, the learned Additional Sessions Judge convicted all the three accused and sentenced them separately.

5. Feeling aggrieved, the present appeal has been preferred by one of the convicts, namely Sanjay Kumar.

6. At the outset, learned counsel for the appellant Sh. Sumeet Verma, Advocate did not challenge the conviction of the appellant for offence u/s. 392 IPC. However, his main challenge is regarding his conviction u/s. 397 IPC on the ground that the weapon of offence was not recovered from the accused and, therefore, Section 397 IPC is not attracted. Reliance was placed on Samiuddin @ Chotu Vs. The State of Nct Delhi, ; Rakesh Kumar Vs. The State of NCT of Delhi, 2005(1)JCC 334 and Sunil @ Munna Vs. The State (Govt. of NCT), 2010(1)JCC 388.

7. Per contra, learned APP for the State relied upon Ashfaq Vs. State (Govt. of NCT of Delhi, SCC (2003) Supp.6 S.C.R; Sanjay Shankar Swami @ Sanjay Kumar Vs. State (NCT) of Delhi, and Kashi Ram Vs. State for submitting that in order to attract the provisions of Section 397 IPC, actual user of the weapon of offence is not necessary. It was sufficient that while committing robbery, the offender was armed with deadly weapon which was within the vision of the victim so as to be capable of creating a

terror in his mind and not that he should have actually used that deadly weapon in the commission of the robbery.

8. I have given my considerable thoughts to the respective submissions of learned counsel for the parties and have perused the record. The findings of the learned Trial Court regarding conviction of the appellant for offence u/s. 392 IPC has rightly not been challenged by learned counsel for the appellant inasmuch as the case of the prosecution stands established from the testimony of the victim Saurabh Aggarwal who has given a graphic version of the entire incident wherein he was robbed by the appellant along with his two other associates when the victim was travelling in bus route no.182 in which the accused was also travelling. He also deposed that his mobile phone was removed. The complainant raised suspicion on accused Tarun. Thereupon the present appellant Sanjay and his co-accused Deshraj whipped out their knives and threatened the victim and later on robbed him of his spectacles and purse and thereafter escaped. Subsequently on 02.12.2009, on the identification of the complainant, the accused persons were apprehended and his blackberry mobile phone was recovered. The witness was subjected to gruelling cross examination. However, nothing could be elicited to discredit his testimony. Moreover none of the accused were known to him from before. That being so, the complainant had absolutely no axe to grind to falsely implicate the accused persons in this case. His testimony finds corroboration from the other material available on record and, therefore, the findings regarding conviction of the appellant u/s. 392 IPC does not suffer from any infirmity which calls for any interference. The same is accordingly upheld.

9. The main thrust of the argument of learned counsel for the appellant was the non-recovery of weapon of offence for alleging that Section 397 IPC is not made out. In Rakesh Kumar (supra), the knife was not recovered nor produced at the trial. There was discrepancy in the testimony of the complainant regarding the knife in as much as in the examination-in-chief, the witness stated it to be a butcher''s knife while in cross examination he could not give the exact description or length of the knife. Under the circumstances, it was observed that it cannot be said that the appellant used a deadly weapon within the meaning of Section 397 IPC. Similarly in Sunil @ Munna (supra), the prosecution could not prove that the knife recovered was the same knife which had been used by the appellant in the commission of the offence, as such the benefit of user of the weapon which is alleged to have been recovered from the accused was given to him and he was convicted u/s. 392 IPC only. In Samiuddin @ Chotu(supra), due to non-recovery of the knife, the appellant was convicted u/s. 392 IPC and was acquitted u/s 397 IPC. However, in none of these cases, the decision rendered by the Supreme Court in Ashfaq(supra) was cited. In that case, it was urged that unless the deadly weapon has been actually used to inflict any injury in the commission of the offence, the essential ingredients to attract the said provision could not have been held to have been proved and substantiated. Repelling the contention it was observed by Supreme Court as

under:-

"We are of the view that the said claim on behalf of the appellants proceeds upon a too narrow construction of the provision and meaning of the words "Uses" found in Section 397 IPC. As a matter of fact, this Court had an occasion to deal with the question in the decision reported in Shri Phool Kumar Vs. Delhi Administration, and it was observed as follows :

"Section 398 uses the expression "armed with any deadly weapon" and the minimum punishment provided therein is also 7 years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. this has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it attracts the minimum punishment of 7 years u/s 398, if he is merely armed with any deadly weapon, while an offender so armed will not incur the liability to the minimum punishment u/s 397 if he succeeded in committing the robbery. But then, what was the purport behind the use of the different words by the Legislature in the two sections, viz. "Uses" in Section 397 and "is armed" in Section 398. In our judgment the anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand, if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to any fruitful use because it would have been of use only when the offender succeeded in committing the robbery."
Thus, what is essential to satisfy the word "Uses" for the purposes of Section 397 IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting, as the case may be."

10. In Sanjay Shankar Swami (supra), substantially similar plea was taken that since no recovery of any weapon of offence has been made from the appellant, Section 397 IPC is not attracted. Repelling the contention, it was observed by a Single Judge of this court that from the testimony of PW-5 it was amply clear that one of the appellants showed him the katta while another showed him a knife. Thus there was use of weapons. Conviction u/s. 397 IPC is not based on consequential recovery but on the user. If the Court is satisfied that a deadly weapon is used then Section 397 IPC is clearly attracted. Similar plea was taken in Kashi Ram Ram & Ors(supra) that in the absence of recovery of weapon of offence it cannot be known whether the knife alleged to have been used was a deadly weapon or not and, therefore, Section 397 IPC could not have been applied for his conviction. The Court followed the view

taken in earlier decision rendered in Ikram Ansari Vs. State(NCT of Delhi) in Crl.A. No. 181/13 and other connected appeals where it was observed as under:-

"In Shri Phool Kumar Vs. Delhi Administration, , the appellant before the Apex Court, namely, Phool Kumar was armed with a knife at the time of commission of the robbery. He was convicted with the aid of Section 397 of IPC. It was submitted on behalf of the appellant that sentencing him to undergo RI for seven years u/s 397 of the Penal Code was illegal and he ought to have been convicted u/s 397 simpliciter. The precise evidence against the appellant was "Phool Kumar had a knife in his hand". Rejecting the contention, the Apex Court held that he was carrying a deadly weapon to the view of the victim which was sufficient to frighten or terrorize them and any other overt act, such as, brandishing of the knife or causing of grievous hurt with it was not necessary to bring the offender within the ambit of Section 397 of the Penal Code. The Apex Court in this regard also referred to Section 398 of IPC which prescribes a minimum sentence of seven years in case the offender at the time of attempting to commit robbery is armed with any deadly weapon and held as under:-

"6. Section 398 uses the expression ""armed with any deadly weapon" and the minimum punishment provided therein is also 7 years if at the time of attempting to commit robbery the offender is armed with any deadly weapon. This has created an anomaly. It is unreasonable to think that if the offender who merely attempted to commit robbery but did not succeed in committing it attracts the minimum punishment of 7 years u/s 398 if he is merely armed with any deadly weapon, while an offender so armed will not incur'' the liability of the minimum punishment u/s 397 if he succeeded in committing the robbery. But then, what was the purport behind the use of the different words by the Legislature in the two sections, viz., "uses"" in Section 397 and "is armed" in Section 398. In our judgment the anomaly is resolved if the two terms are given the identical meaning. There seems to be a reasonable explanation for the use of the two different expressions in the sections. When the offence of robbery is committed by an offender being armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in his mind, the offender must be deemed to have used that deadly weapon in the commission of the robbery. On the other hand if an offender was armed with a deadly weapon at the time of attempting to commit a robbery, then the weapon was not put to a fruitful use because it would have been of use only when the offender succeeded in committing the robbery."

38. Carrying a deadly weapon in a manner that it is seen by the victim clearly is aimed at intimidating the victim to part with the property under a fear that if he does not part with the property, the weapon being carried by the offender can be used against him. There is nothing in the judgment to indicate that the size of the knife which the appellant Phool Kumar carried with him at the time of commission of the offence was indicated by the witnesses or that the said knife was recovered by

the police during the course of investigation. Despite that, the Apex Court upheld his conviction with the aid of Section 397 of IPC.

39. In Salim Vs. State (Delhi Administration), , decided on 09.11.1987, the charge against the appellant was that they committed robbery while armed with knives. It was contended on behalf of the appellant that no offence u/s 397 of IPC could be said to have been committed inasmuch as the knife had not been recovered. Reliance in this regard was also placed upon Murari Lal Vs. State (Delhi Administration), , wherein no knife had been recovered and it was contended that unless the size of the blade was known, a knife could not ordinarily be classified as a deadly weapon within the meaning of Section 397 Indian Penal Code. The learned counsel for the appellant in that case placed reliance also upon an earlier decision of this Court in Balik Ram Vs. The State, . Relying upon the observation of the Apex Court in Phool Kumar (supra) that "so far as he is concerned he is said to be armed with a knife which is also a deadly weapon. To be more precise from the evidence of PW-16 "Phool Kumar had a knife in his hand", the contention was rejected by this Court. It was held that since the aforesaid decision of the Apex Court had not been referred to in the earlier decisions in Balik Ram (supra) and Murari Lal (supra), the said decisions were not a binding precedent. While rejecting the appeal, this Court, inter alia, observed and held as under:-

"The Concise Oxford Dictionary defines the word ''weapon'' as ''material thing designed or used or usable as an instrument for inflicting-bodily harm, e.g. gun, bomb, rifle, sword, spear, stick hammer, poker, horn, claw''. The word ''deadly'', according to this Dictionary, means ''causing fatal injury''. Also, according to this Dictionary, ''knife'' means ''blade with sharpened longitudinal edge fixed in handle either rigidly or with hinge used as cutting instrument or as weapon''. As per Webster''s Third New International Dictionary a ''knife" is ''a simple instrument used for cutting consisting of a sharp-edged usually steel blade provided with a handle''. Longman Dictionary of Contemporary English defines ''knife'' as ''a blade fixed in a handle used for cutting as a tool or weapon''. These definitions in various dictionaries can be multiplied. We all understand what a knife means and to categorise it or to fix its size for it to be a deadly weapon may not be appropriate. A knife has also been'' described as a pocket knife, pen knife, table knife, kitchen knife, etc. It cannot be denied that a knife can be used as a weapon of offence. It can cut, it can pierce, it can be deadly. To say that a knife to be a deadly weapon should be of a particular size would perhaps be not a correct statement."

Similar view was taken in State of Maharashtra vs. Vinayak, 1997 Crl.L.J. 3988, where the High Court held that irrespective of its size, any knife is a deadly weapon."

11. In view of the pronouncements of Supreme Court in Ashfaq(supra) and two other decisions relied upon by learned APP for the State by this Court, mere fact that weapon of offence could not be recovered particularly for the reason that the incident had taken place on 18.11.2009 but the accused could be arrested only on

02.12.2009 it cannot be said that offence u/s. 397 IPC is not made out as complainant had deposed that the accused was armed with a knife which was put on his neck and back and thereafter the appellant removed his purse. Thus there is use of a deadly weapon and therefore Section 397 IPC is clearly attracted. That being so, there is no infirmity in the judgment dated 18.05.2011 whereby the appellant was convicted for offence u/s. 392 read with Section 397 IPC.

12. The minimum sentence prescribed for offence u/s. 397 IPC is not less than 7 years which has been awarded to the appellant and therefore, even interference in the quantum of sentence is not warranted. That being so, there is no merit in the appeal. The appeal as well as the application are accordingly dismissed.

13. Copy of the judgment along with Trial Court record be sent back. Appellant be informed through Superintendent Jail.